UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-HC-2035-BR

UNITED STATES of AMERICA,	)	
	)	
Petitioner,	)	
v.	)	ORDER
	)	
BENJAMIN BARNARD JOSHUA,	)	
	)	
Respondent.	)	

This matter is before the court on respondent's 1 July 2009 motion to dismiss. By order filed 5 October 2009, the court directed the government to file a response to the motion, and allowed respondent ten days thereafter to file any reply. (10/5/09 Order at 3.) The parties have filed briefs as ordered, and the motion is ripe for disposition.

The court set forth the factual and procedural background in this case in detail in its 5 October 2009 order, and it does not appear that either party disagrees with the statement of the facts as set forth in that order. By way of brief background, respondent was convicted in 1995 in a military court martial proceeding of violations of the Uniform Code of Military Justice. Respondent was sentenced to a term of 25 years, and his projected release date was 17 March 2009. He served a portion of his sentence at the United States Disciplinary Barracks at Leavenworth, Kansas ("USDB Leavenworth"). In 2001, USDB Leavenworth transferred respondent to complete his sentence within the Federal Bureau of Prisons ("BOP") system, and the Army formally discharged respondent. On 23 December 2008, BOP transferred respondent to the Federal Medical Center in Butner, North Carolina ("FMC-Butner"). On 9 March 2009, the government filed a petition for respondent's commitment under 18 U.S.C. § 4248.

On 8 January 2009, the Fourth Circuit affirmed this court's finding that § 4248 is

unconstitutional in United States v. Comstock, 551 F.3d 274 (4th Cir. 2009). Respondent filed a motion to dismiss on 27 March 2009 "in anticipation of issuance of the Fourth Circuit's mandate in [Comstock]." (3/27/09 Mot. Dismiss at 8.) However, on 3 April 2009, the Supreme Court stayed issuance of the mandate. Respondent then filed the instant supplemental motion to dismiss on 1 July 2009, contending that the commitment petition against him must be dismissed because of his "status as a military prisoner[.]" (7/1/09 Mot. Dismiss at 2.) Specifically, respondent contends that because he was prosecuted and convicted in the military justice system, he is not "in the custody of the Bureau of Prisons" ("BOP") as required by 18 U.S.C. § 4248 in order to initiate commitment proceedings thereunder. (Id. at 5-6.)

II. DISCUSSION

Respondent relies extensively on a recent Seventh Circuit case, United States v. Hernandez-Arenado, 571 F.3d 662 (7th Cir. 2009), and thus the court begins with a recitation of the pertinent facts and analysis of that case. The defendant, a citizen of Cuba, had been granted immigration parole under 8 U.S.C. § 1182(d)(5) and was subsequently convicted of a criminal offense under the laws of the state of New Jersey. Hernandez-Arenado, 571 F.3d at 663. The then-Immigration and Naturalization Service ("INS") thereafter revoked his parole, and upon his release from state prison, detained him pending deportation pursuant to 8 U.S.C. § 1231(a)(6). Id. The INS (and ultimately Immigration and Customs Enforcement ("ICE")) detained the defendant, and housed him in a BOP facility under this statute for more than twenty years. Id. at 664. The defendant succeeded in obtaining his release via a habeas corpus petition, but before his release date, the BOP filed a certification seeking to subject the defendant to civil commitment under 18 U.S.C. § 4248. Id. The defendant challenged the government's authority to seek his commitment, and the Seventh Circuit

held that the defendant "was in the custody of the ICE for purposes of [§ 4248] and that the ICE's decision to house him in BOP facilities did not render him in the custody of the BOP under that" statute. Id.

In coming to that conclusion, the Seventh Circuit noted that a certificate may only be filed against "'a *person who is in the custody of the Bureau of Prisons*,'" and thus found it necessary to determine what Congress meant by "custody." Hernandez-Arenado, 571 F.3d at 665 (emphasis in original; quoting and citing 18 U.S.C. § 4248(a)). The court noted that "the term 'custody' will have different meanings in different contexts." Id. (citing Rumsfeld v. Padilla, 542 U.S. 426, 438 (2004); Ramsey v. Brennan, 878 F.2d 995, 996 (7th Cir. 1989)). "[U]nder an interpretation based on physical custody alone, the categories of persons included is vast, including those housed in BOP facilities as material witnesses, under civil contempt orders, on writs of habeas corpus ad testificandum, or under contract with other sovereigns[,]" and the court expressly "reject[ed] an interpretation that would allow physical custody alone to suffice . . . ." Id. at 666-67. The court noted that the civil commitment statutes contain two specific categories of persons to whom the statutes apply: "those committed to the Attorney General's custody for determination of competency to stand trial in federal court, and those against whom all federal criminal charges have been dismissed for reasons relating to their mental condition[,]" id. at 665, and concluded that

> There could be no reason to provide the specificity in the other categories if the BOP category was to be read so broadly as to include those categories and more. An interpretation based on the physical locale of the person would greatly expand [§ 4248], to ensnare even those who are at the BOP by chance, as where state prisons are overcrowded, or as a result of no criminal action on their part, as with material witnesses. Ironically, it would also exclude federal offenders from coverage, as 18% of those offenders do not reside in the physical custody of the BOP. That makes no sense. The more rational reading of [§ 4248] would read custody more narrowly as including all federal offenders, but not those housed in the BOP as a service to another entity which is responsible for that individual's incarceration.

Id. at 667. Accordingly, the court dismissed the commitment petition. Id.

The government contends that Hernandez-Arenado "is easily distinguishable from the instant case" because "[r]espondent's connection to the [BOP] is significantly more than mere physical custody. Respondent was serving a criminal sentence imposed by the U.S. Military, and became subject to BOP policies and procedures including § 4248 when he was transferred from the U.S. Army to the custody of the Bureau of Prisons pursuant to a specific federal statute and an interagency agreement." (Govt. Resp. Opp. 7/1/09 Mot. Dismiss at 2.)

In support of its contentions, the government cites 10 U.S.C. § 858. That statute provides (in pertinent part) that

> a sentence of confinement adjudged by a court-martial or other military tribunal . . . may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States . . . . Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States . . . .

10 U.S.C. § 858. On its face, the court finds that the statute does not commit respondent "to the custody of the Attorney General" as the government contends, (Govt. Resp. Opp. 7/1/09 Mot. Dismiss at 3.) As further evidence on this issue, respondent points to 18 U.S.C. § 3621, which governs the imprisonment of persons convicted of federal offenses and specifically commits such persons "to the custody of the Bureau of Prisons," and notes that military offenders are excluded from this statute under 18 U.S.C. § 3551. (Respdt. Reply Supp. 7/1/09 Mot. Dismiss at 3 n.1.)

The government also points to an interagency Memorandum of Agreement between the Army and BOP, Interagency Agreement 512-5, dated 27 May 1994 ("MOA"). (Govt. Resp. Opp. 7/1/09 Mot. Dismiss at 10 and Exh. A (MOA).) The MOA "establishes policies and procedures

governing the transfer of military prisoners . . . to the [BOP]." (MOA ¶ 1.) It provides that military prisoners transferred to a BOP facility to be "permanently maintain[ed] . . . [are] subject to all []BOP administrative and institutional policies and procedures." (MOA ¶¶ 4a, k.) It grants parole authority to the United States Parole Commission, yet reserves clemency authority to the Army, and describes military prisoners to be transferred as being "in permanent custody of the . . . Army." (MOA ¶¶ 3c, 4k-*l*.) The court is not persuaded that this MOA "sets forth the broad scope of the BOP's custodial authority over certain military prisoners," (Govt. Resp. Opp. 7/1/09 Mot. Dismiss at 10), such that a military prisoner transferred for physical confinement in a BOP facility becomes indistinguishable from a prisoner committed to BOP custody under 18 U.S.C. § 3621. Furthermore, the issue is not what agreement the Army and BOP reached in arranging for a prisoner transfer, but rather whether Congress intended military prisoners to be "in the custody" of the BOP when drafting § 4248.

On this point, the most convincing argument the government makes is that 18 U.S.C. § 4247(j) specifically excludes military prosecutions from the provisions of §§ 4241-4244, but makes no mention of §§ 4245-4248. (Govt. Resp. Opp. 7/1/09 Mot. Dismiss at 11.) In turn, however, respondent points to a BOP Position Statement ("PS"), dated 21 September 1995, which excludes military prisoners from 18 U.S.C. §§ 4241-4247.[1] BOP PS 6010.01, ¶ 8(c) (9/25/95), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc (last visited Jan. 7, 2010).

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 1756 (2009) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). Only where "the language of the statute is unclear, may [the court] consult its legislative history as a guide

[1] 18 U.S.C. § 4248 was subsequently enacted, on 27 July 2006.

to congressional intent." Yi v. Federal Bureau of Prisons, 412 F.3d 526, 533 (4th Cir. 2005) (citing United States v. Rast, 293 F.3d 735, 737 (4th Cir. 2002); BedRoc Ltd., LLC v. United States, 541 U.S. 176, 187 n.8 (2004)). As the Seventh Circuit noted, the term "custody" is not necessarily clear. Hernandez-Arenado, 571 F.3d at 665. The district court examined the legislative history of § 4248 and found that it

> supports the conclusion that Congress did not intend the Act to apply to [person]s not held under the authority of the [Department of Justice]. The Report of the Committee on the Judiciary about the Children's Safety Act of 2005 bill, eventually renamed the Adam Walsh Act, is consistent with this view. The "Purpose and Summary" section of the report describes the nearly identical civil commitment proceedings contained in § 511(4) of that bill as "procedures for civil commitment of *Federal sex offenders* who are dangerous to others because of serious mental illness, abnormality or disorder." H.R. Rep. No. 218(I), 109th Cong., 1st Sess. 22, (2005) (available at 2005 WL 2210642) (emphasis added). The report's description of the civil commitment procedures likewise evinces only an intent to expand existing civil commitment procedures for federal sex offenders[.]

United States v. Hernandez-Arenado, 624 F. Supp. 2d 985, 989-90 (S.D. Ill. 2008) (emphasis in original).

Likewise, therefore, the court concludes that § 4248 does not apply to respondent. The motion to dismiss is ALLOWED. However, for the reasons stated in United States v. Comstock, 507 F. Supp. 2d 522, 560 (E.D.N.C. 2007), the court temporarily STAYS the effect of this order until further order. The government may file a motion to stay respondent's release within twenty (20)

days of the date of this order. Respondent shall have twenty (20) days thereafter to file any response.

This 13 January 2010.

W. Earl Britt
Senior U.S. District Judge